Supreme Court of the United States,

OCTOBER TERM, 1874.

No. 148.

THE NATIONAL BANK OF COMMERCE,
OF BOSTON,
PLAINTIFF IN ERROR,

v.

THE MERCHANTS' NATIONAL BANK,
OF MEMPHIS.

BRIEF FOR DEFENDANT IN ERROR.

W. G. RUSSELL,
For Defendant in Error.

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
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BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF CASE.

The uncontested material facts, as shown by the record, are as follows: —

The Bank of Memphis, the original plaintiff in this case, in June, 1870, discounted for James H. Mulford two drafts drawn by him on Green & Travis, of Boston, payable in thirty days *from date* to the order of said Mulford, and by him indorsed. Said drafts upon their face purported to be drawn against a specified number of bales of cotton, and to have the bills of lading attached; and in fact bills of lading, or railroad receipts for the cotton, made to the order of said Mulford and by him indorsed in blank, were attached to the drafts and delivered with them to the bank.

In the same month of June, 1870, said bank discounted for one S. M. Anderson a *sight* draft drawn by him on Green & Travis, payable to said Anderson's order, and by him indorsed; to which draft was attached at the time of discount a bill of lading for one hundred and eight bales of cotton shipped by him to Green & Travis, indorsed in blank by said Anderson.

Said Mulford and Anderson were cotton buyers or brokers, at Memphis, without capital or pecuniary credit, and said drafts were drawn and bills of lading transferred, to enable them to raise money for the purchase of the cotton to be shipped to Green & Travis, who had agreed to purchase the same of them at the prices represented by the several drafts.

The drafts, with bills of lading attached, were forwarded by the Bank of Memphis for collection to the Metropolitan Bank, its correspondent in New York, and by that bank were transmitted to the Bank of Commerce, the original defendant, its correspondent in Boston, by letters which enclosed also other drafts, all which were stated to be sent "*for collection.*"

These three transactions were of the same nature with numerous others between said Mulford, said Anderson and said banks, except that said sight draft of Anderson was the only sight draft drawn by either of said parties in the course of their dealings.

The Bank of Commerce presented the several drafts as they were received; and upon their acceptance by Green & Travis detached and surrendered to them the several bills of lading; and they thereupon procured and sold the cotton upon said two first-named bills of lading, and transferred the third bill of lading to a *bonâ fide* purchaser in pledge for ten thousand dollars, which sum the Bank of Memphis paid to redeem the same.

On the twenty-ninth day of June, the day when the sight draft was accepted and the bill of lading attached thereto was surrendered, Green & Travis failed, and have since gone into bankruptcy without assets, so that said thirty day drafts remain wholly unpaid to the Bank of Memphis.

By the special findings of the jury it is also to be taken as part of the case:

1. That there was an agreement by Green & Travis with Mulford and with Anderson, that the bills of lading should be delivered up on their acceptance of the drafts;
2. That such agreement was not known to the Bank of Memphis.

This action is brought against the Bank of Commerce to recover damages for their negligence and disregard of duty as collecting agents of the plaintiff, in improperly surrendering the bills of lading to Green & Travis; and the principal questions left open upon the facts and the rulings of the judge evidently are, —

1. Whether a bill of lading for goods, attached to a draft drawn against such goods, is in the hands of a *boná fide* purchaser and indorsee for value, security for the *payment* or only for the *acceptance* of the draft, in the absence of any special agreement of which the holder has notice.

2. Whether a bank, receiving such draft and bill of lading attached, from the holder, "*for collection*," and without further instructions, is bound to retain the bill of lading until payment of the draft, or only until its acceptance.

Before proceeding, however, to these main questions certain specific exceptions to rulings made in the course of the trial, and which may or may not be now relied on, are to be considered.

PRELIMINARY EXCEPTIONS.

1.

The first of these is to be found on page 49 of the Record; and is founded on an objection to the admission of the letter of defendant's cashier of June 13, 1870, wherein he states the standing of Green & Travis. A copy of this letter is on page 26 of the Record.

(*a.*) The letter was originally admissible, when first offered by the plaintiff.

The declaration alleges in one set of counts that the Bank of Commerce surrendered the bill of lading, *knowing Green & Travis to be insolvent.*

Two of the bills were surrendered after the date of this letter; one of them on the very day of the failure of Green & Travis; and the letter was evidence tending to show knowledge by defendants of the standing or want of standing of the firm.

It was the knowlege of the officer of defendant bank who had charge of the collection of these drafts.

(*b.*) The letter, when admitted, had been made matter of full inquiry by the defendants in cross-examination of Woodruff, the president of the plaintiff bank.

See deposition of Woodruff, Record, p. 39.

The cross-examination developed the fact that at Woodruff's request the Metropolitan Bank inquired of the Bank of Commerce as to the standing of Green & Travis, and received this letter in reply; and the letter not being in possession of the witness, he was examined as to its contents.

The defendants relied on the fact that this inquiry was made and answered; and their examination made it competent for the plaintiffs to produce the letter which contained the answer.

The defendants having undertaken to prove the contents of the letter by secondary evidence cannot object to the production of the letter itself.

(3.) The admission of the letter at the time it was ruled in was wholly immaterial. It had been already produced and made part of the deposition of Seney, on behalf of the Bank of Commerce.

See Record, p. 58.

This deposition the plaintiffs had the right to use, and offered to read to the jury, and refrained from so doing only on the defendants' counsel stating that they proposed to put it in; which they afterwards did.

See Record, p. 49.

The letter was, therefore, already in the case when offered by the plaintiffs.

(4.) The letter was finally put in by the defendants.

See Record, pp. 54, 59.

2.

The defendants, in the court below, at the close of the plaintiffs case, asked the Court to instruct the jury "that it was the duty of the plaintiffs to surrender the bills of lading upon the acceptance of the drafts, and that they were not bound to hold the same for payment"; and the refusal so to rule is the ground of the second exception taken.

See Record, p. 49.

This request was equivalent to a prayer for a ruling that upon the plaintiffs' evidence the defendants were entitled to a verdict.

The refusal so to rule is not ground for exception.

(*a.*) It was wholly within the discretion of the judge whether or not to rule upon the plaintiffs' case before the defendants' case was closed.

Bassett *vs.* Porter, 4 Cush. 487, 491.
Bradley *vs.* Poole, 98 Mass. 169, and cases cited.

(*b.*) By proceeding with his evidence the defendant waived his motion for a ruling on the plaintiffs' case.

McGregory *vs.* Prescott, 5 Cush. 67.
Johnson, J., in Elmore *vs.* Grymes, 1 Pet. 469, 472.

As it was determined in *Elmore* vs. *Grimes*, above cited, that a motion for non-suit cannot be granted in the Courts of the United States without the plaintiff's consent, it has become customary to ask a ruling to the jury that the evidence does not warrant a verdict in his favor; and where there are no disputed facts such ruling may be given.

Bevans *vs.* United States, 13 Wall. 56.

But such a prayer at the close of the plaintiffs' case is to be treated as a demurrer to evidence.

Parks *vs.* Ross, 11 How. 362.

If so treated the demurrer or request is waived by proceeding to introduce further evidence.

No case has been found where the refusal to rule upon the plaintiff's evidence has been held error.

(*c.*) It is plain that a demurrer to the evidence could not be sustained. There was evidence to go to the jury, even upon the ground that the defendants delivered the bill of lading knowing the drawees to be insolvent.

3.

The third exception is to the refusal of the judge to admit letters written by Anderson to E. A. Travis.

See Record, p. 53.

(*a.*) The ruling of the Court that the letters were inadmissible to show an agreement between Anderson and Green & Travis was correct.

The letters were not addressed nor communicated to Green & Travis; but to E. A. Travis, the agent of Anderson, not a member of the firm.

They had no tendency in themselves to prove an agreement, and were inadmissible, as *res enter alios*.

(*b.*) Neither could they be introduced to contradict Anderson.

Anderson on his direct examination testified that he never made any agreement with Green & Travis to give up the ?ills of lading on acceptance of the drafts.

To contradict this, defendants proposed to show letters to a third person (not to Green & Travis), which could only be admitted as statements made by him conflicting with those in his deposition.

For such contradiction foundation must be laid by calling the attention of the witness to the matter of the alleged statements.

Conrad *vs.* Griffey, 16 How. 38.

(*c.*) The exclusion of the letters was immaterial, as the only fact they were offered to prove, viz. the agreement between Green & Travis and Anderson, was found in favor of the defendants by special verdict of the jury.

Record, p. 61.
Lucas *vs.* Brooks, 18 Wall. 436.

INSTRUCTIONS ASKED BY DEFENDANTS AT THE CLOSE OF THE TESTIMONY.

(1.)

Of the three prayers for special instructions offered by the defendants at the conclusion of the whole evidence, the first prayer only presents any question for the Court, viz. the prayer for instruction, that as matter of law, the Bank of Memphis was chargeable with notice of the alleged agreement between Green & Travis and the drawers of the drafts as to the surrender of the bills of lading, if any such agreement existed.

The exception to the refusal so to rule will be dealt with in discussing the main questions of the case.

(2.)

The second prayer, for instruction as to the effect of such agreement, if known to the Bank of Memphis, and the refusal of such instruction, are immaterial, as the jury have negatived such knowledge on the part of the plaintiffs by their special finding.

Record, p. 61.

In fact the jury were only instructed that such an agreement would not bind the bank, *if the bank had no knowledge of it.*

Record, p. 59.

(3.)

The ruling asked in the third prayer was in substance given by the judge, and in form more favorable to the defendants than was asked.

The jury were instructed not only that "if the Bank of Memphis or the Metropolitan Bank had knowledge of the fact that the Bank of Commerce surrendered bills of lading when attached to bills of exchange, upon acceptance of the bills, and transmitted them with the knowledge that they would be thus dealt with, the defendants are not liable," *but also, that such knowledge and instructions so to deliver them might be inferred from a course of dealing between the parties, or from a course of dealing between the Metropolitan Bank and the Bank of Commerce only.*

See Record, pp. 60, 61.

These instructions were certainly sufficiently favorable for the defendants, and under them the jury must have found that neither the Bank of Memphis nor the Metropolitan Bank had actual or implied notice of the course pursued by the Bank of Commerce in relation to these bills of lading.

We come, then, to the main questions of the case; and it is submitted, that the presiding judge in the court below was correct in his rulings, which were, in substance: —

1. That upon the undisputed facts the Bank of Memphis had the right to hold the bills of lading until payment of the drafts, and as security therefor.

2. That in the absence of any instruction to the defendant bank, except by the mere transmission of the bills of exchange with the bills of lading attached "*for collection*," and in the absence of any consent, expressed or implied, the defendant bank would not be authorized to separate the two securities and to deliver up the bill of lading upon acceptance of the bill of exchange and before payment thereof.

A.

In the hands of the Bank of Memphis the bills of lading were security for payment of the bills of exchange.

I.

By retaining the bills of lading and indorsing and delivering them to the Bank of Memphis, the shippers of the cotton reserved to themselves, and transferred to the bank, the entire *jus disponendi*, as well as the legal title of the cotton, and no title passed to the proposed consignees, Green & Travis.

Benjamin on Sales, 2d Ed. p. 288 *et seq*.
Wait *vs*. Baker, 2 Exch. 1.
Jenkyns *vs*. Brown, 14 Q. B. 496.
Ellershaw *vs*. Magniac, 6 Exch. 570.
Turner *vs*. Liverpool Docks, 6 Exch. 543.
Shepherd *vs*. Harrison, L. R. 5 H. of L. 116.
Gilbert *vs*. Guignon, L. R. 8 Ch. 16.
The Marie Joseph, L. R, 1 P. C. 219.
Henderson *vs*. Comptoir d'Escompte, L. R. 5 P. C. 253.
Bank of India *vs*. Henderson, L. R. 5 P. C. 501.
Conrad *vs*. Atlantic Ins. Co., 1 Pet. 386, 445.
Walter *vs*. Ross, 2 Wash. C. C. 283, 286.
The Thames, 14 Wall. 98, 106.

City Bank *vs.* Rome and Watertown R. R., 44 N. Y. 136.
Cayuga Bank *vs.* Daniels, 47 N. Y. 631.
Marine Bank *vs.* Wright, 48 N. Y. 1.
Seymour *vs.* Newton, 105 Mass. 272
First Nat Bank of Cairo *vs.* Crocker, 111 Mass 163.
First Nat. Bank of Greenbay *vs.* Dearborn, 115 Mass. 219.
Fifth Nat. Bank of Chicago *vs.* Bayley, 115 Mass. 228.
Newcomb *vs.* Boston and Lowell R. R., 115 Mass. 230.
Alderman *vs.* Eastern R. R., 115 Mass. 233.

These cases abundantly establish the doctrine that the bill of lading is the symbol of the property which it represents; that the legal inference from the vendor's retaining it is, that he controls the possession of the carrier and makes him accountable to the holder of the bill of lading, and so retains the right of dealing with the property by transfer of the bill of lading; that it is incumbent on the vendee, or consignee, or any one claiming title under him, to control the legal effect of such retention or transfer of the bill of lading, and to show that the evidence of ownership and of the right to deal with the property, consequent on the authority of the bill of lading, is controlled by other facts; otherwise the legal inference of ownership in the holder of the bill of lading is conclusive.

Lord Westbury in Shepherd *vs.* Harrison, L. R. 5 H. L. 116, 129.
First Nat. Bank of Cairo *vs.* Crocker, 111 Mass. 163, 167.

II.

The title thus transferred to the Bank of Memphis was not affected by any secret or undisclosed agreement between the shippers of the cotton and Green & Travis.

The title acquired by a *bonâ fide* purchaser for value of a bill of exchange with bill of lading attached, is equally valid, whatever may be the relation between the shipper and the consignee; whether that of vendor and vendee, or agent and principal, or even that of a debtor, shipping to a creditor in payment of an existing debt.

(*a.*) The whole record shows that this case was tried in the Court below upon the assumption and concession by the defendants that the relation between the shipper and the consignee was that of vendor and vendee; and the judge below was warranted in assuming this as one of the undisputed propositions whether of law or of fact

No instructions were asked of him upon any theory that Mulford or Anderson might be treated as the agent of Green & Travis, nor was his attention in any way called to such a theory of the case.

Error, therefore, would not lie for failure to instruct the jury upon the effect of establishing the relation of principal and agent between the parties.

Shutte *vs*. Thompson, 15 Wall. 151.

But what is conclusive upon this point, is that the pleadings on behalf of the defendants clearly and distinctly set up the fact that Green & Travis were purchasers, and Mulford and Anderson were vendors of the cotton.

See Answer, Record, pp. 10, 11, 12.

The case, therefore, presents itself in the simplest form, presented in the authorities above cited, viz. that of a shipment of goods by the owner, who at most has made an executory contract for their sale to the consignee.

It is well settled that in such case the vendor, by retaining or transfering the bill of lading, retains or transfers the absolute title and *jus disponendi* of the goods; he may alter entirely their destination; may divest the proposed purchaser of all possible future or contingent title; and in fact may, so far as title is concerned, deal with the goods as he pleases, with any one who takes them *bonâ fide* and for value.

This doctrine lies at the foundation of, and is supported by, all the authorities above cited.

See Cayuga Bank *vs*. Daniels, 47 N. Y. 633, 637.

(*b*.) The title of the bank would be equally good, although the shippers had purchased the cotton upon the orders of the consignee, and as his agents.

In many of the cases above cited, the facts disclosed this relation between the parties.

See Jenkyns *vs.* Brown, 14 Q. B. 496.
Turner *vs.* Liverpool Docks, 6 Exch. 543.
Shepherd *vs.* Harrison, L. R., 5 H. L. 116.
Seymour *vs.* Newton, 105 Mass. 272,

And in some of them there was even an agreement that the goods shipped might be applied by the consignee to the payment of a pre-existing debt of the consignor; yet such agreement was held not to affect the title of a *bonâ fide* holder of the bill of lading.

See Cayuga Bank *vs.* Daniels, 47 N. Y. 631.
Marine Bank *vs.* Wright, 48 N. Y. 1.
First Nat. Bank of Cairo *vs.* Crocker, 111 Mass. 163.
First Nat. Bank of Greenbay *vs.* Dearborn, 115 Mass. 219.

(*c.*) The case at bar, if it could in any event be treated as one of purchase and shipment by an agent for his principal, is one in which the principal would be bound, even by a contract made in violation of the agent's agreement, or instructions.

The agent is one who, from the nature of his employment, is intrusted with the indicia of title to the property in question, and in fact holds the legal title and apparent authority to deal with it.

His acts are within the general scope of his employment, and in the ordinary course of the business in which he is engaged.

Secret instructions from the equitable owner to his agent, the legal owner, who holds the usual documentary evidence of title, will not affect the rights of a purchaser without notice.

Calais Steamboat Co. *vs.* Van Pelt, 2 Black, 372.
Butler *vs.* Maples, 9 Wall. 766.
Insurance Co. *vs.* Wilkinson, 13 Wall. 222.
Dyer *vs.* Pearson, 3 B. and C. 38.
Taylor *vs.* Pope, 5 Cold. [Tenn.] 413, 419.
White *vs.* Vann, 6 Humph. 70.
Rodger *vs.* Comptoir d' Escompte, L. R. 2 P. C. 393, 405.

(*d.*) Moreover the facts in the case now before the Court show that the advance of money by the bank, the original purchase of the cotton by Mulford and Anderson, and the discounting of the drafts, and the procuring of the bills of lading from the carrier, and their transfer to the bank, were all parts, and dependent parts, of one transaction.

The cotton was originally purchased and paid for with the proceeds of the securities, obtained by Mulford and Anderson, in advance of the actual receipt of those securities by the bank or the actual delivery of the goods to the carrier.

Mulford and Anderson, in fact, never held the ownership of the cotton for an instant, except upon a trust which bound them to transfer it, as they did, to the bank as security for the purchase money.

The transaction is stated in Mulford's testimony, which was uncontrolled and undisputed, as follows: —

" *We were allowed to draw before we got the bill of lading. We paid for the cotton first; we paid for the cotton before we got it to the depot. We got the money from the bank and drew our bill to cover the money we had received. We got our advance on the expectation of the bank that the cotton bill would be drawn.*" See Record, p. 24.

If, then, Green & Travis claim title as principals to the property which Mulford and Anderson, as their agents, purchased with funds thus obtained from the Bank of Memphis, they cannot, by virtue of a secret agreement, or of secret instructions to such agents, dispute or qualify the title which, as part of the same transaction, those agents undertook to convey to the bank for its security, in pursuance of the agreement on which they procured the funds.

The principal must wholly ratify or wholly repudiate the transaction; " it is his duty to approbate or reprobate the whole proceeding."

To this point are pertinent various authorities above cited, holding that the principal can make no title to the goods shipped by his agent whose draft drawn against them he refuses to accept.

Shepherd *vs.* Harrison, L. R. 5 H. L. 116, 133.

III.

Nor does it affect the title of the Bank of Memphis, under the bill of lading attached to the sight draft of Anderson, that the bill of lading was not in terms made to the order of the shipper.

The retention or transfer of a bill of lading as security for the purchase money, is equally effectual to retain or transfer title to the goods, though it be not drawn "to order," or even though, being so drawn, it is indorsed to the consignee, but not delivered to him.

Gibson *vs*. Stevens, 8 How. 384.
First Nat. Bank of Greenbay *vs*. Dearborn, 115 Mass. 219.
City Bank *vs*. Rome and Watertown Railroad, 44 N. Y. 136.
Cayuga Bank *vs*. Daniels, 47 N. Y. 631.
First Nat. Bank of Cairo *vs*. Crocker, 111 Mass. 163.
Fifth Nat. Bank of Chicago *vs*. Bayley, 115 Mass. 228.
Newcomb *vs*. Boston and Lowell Railroad, 115 Mass. 230.
Henderson *vs*. Comptoir d'Escompte de Paris, L. R. 5 P. C. 253.

IV.

The cases cited to the points above made, though numerous, are only selections from a larger number in which the courts of England and this country have tested the validity of title under a bill of lading held or transferred by the shipper as security for advances, as against the title of the consignee, or against the carrier who has delivered to the consignee.

It is confidently believed that whatever the relations or agreements between the shipper and the consignee, and whatever the form of the bill of lading or of its transfer, no case can be found in which the courts have disturbed or questioned the title of a party advancing to the shipper *boná fide* the money for the purchase of goods, and taking therefor his draft upon the consignee with the bill of lading or carrier's receipt attached thereto.

The transaction under which the Bank of Memphis claims title, was one well known to be according to the general and established usages of a wide-spread branch of trade, of which the court would take judicial cognizance, even if it were not sustained by previous decisions.

Gibson *v.* Stevens, 8 How. 384.

In the case cited, this Court sustained the title conferred by transfer of warehouse receipts as conveying a constructive possession equivalent to the delivery of the goods.

The language of Chief-Justice Taney, in delivering the opinion of the Court, is as applicable to the facts in this case as it was to the facts of the case with which he was dealing.

"In examining the question between these parties it is proper to say that if the fact had not been admitted, that the dealing between McQueen & McKay and the plaintiff was in the usual course of trade, *the Court would have felt itself bound to take judicial notice of it.* . . . The statement of facts in this case describes the usual course of a great inland commerce, by which the larger part of the agricultural productions of the valley of the Mississippi find their way to a market. It had existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory and is of such general importance that its ordinary course and usages are now publicly known and understood; and it is the duty of the Court to recognize them as it judicially recognizes the general and established usages of trade on the ocean. For if, by any decision of this Court, doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations to the injury of all connected with it, and would certainly not be less injurious to the agriculturist and producer than to the merchant and trader."

It may well be doubted whether any decision affecting the validity of title under warehouse receipts could ever have been so ruinous in its effects upon the business by which the great products of the South and West find their way to the East and a market, as would be now a decision of this Court which should throw a shadow of doubt upon the security of the title derived by discounting drafts drawn upon the consignee against produce shipped by rail, with carrier's receipts attached, by holding that such title can be affected or disturbed by undisclosed arrangements between the shipper and the consignee.

V.

The Bank of Memphis holding the bills of lading by valid title, had the right to hold them for payment of the drafts, and was not bound to surrender them to the drawees merely upon acceptance.

It is submitted that this is the only legal inference to be drawn from the transaction between the drawer and the bank, as disclosed by the Record.

(1.) The bank advanced the money with which the cotton and the bills of lading were procured; and whether this advance was for or on account of the drawer or the drawee of the drafts, the legal presumption is, that the security was given for repayment of the advance; the security, therefore, should be held equally valid against both.

(2.) The lowest possible inference to be drawn from the mere fact of transfer of the bill of lading by the drawer is, that it is to be held as security for the drawer's contract.

Now that contract is not only that the draft shall be accepted, but that it shall be paid by the acceptor; and the drawer is as much bound for the one as for the other.

There can be no ground for presuming, in the absence of all testimony to that effect, that the pledge accompanying the draft was to be security for a part performance of the contract embodied in the draft at its inception.

(3.) Not only is there no evidence to justify the presumption in this case, that the security was to be held for anything less than the entire performance of the drawer's contract, but, on the contrary, the uncontradicted, undisputed facts, are such as to show conclusively that the bank relied upon the bills of lading as security for payment.

(*a.*) It is abundantly proved, and nowhere questioned, that the drawers of the drafts were entirely without means or credit, and were known to be so by the plaintiffs.

Record, pp. 27, 28, 35, 36, 41, 42, 44, 45.

(*b.*) It is equally well proved and unquestioned that the standing of Green & Travis, the drawees of the drafts, did not entitle them to credit with the plaintiffs; and that no such credit as would be represented by the amount of their unpaid acceptances outstanding in the course of their transactions with the bank, nor in fact any credit whatever would have been given them upon their mere name without security.

Record, pp. 27, 28, 35, 36, 37, 42, 45.

The amount of these unpaid acceptances, upon the defendants' testimony, was at one time the price of 1000 bales of cotton.

See letter of Anderson, Record, p. 53.

To find upon these facts and this testimony that the Bank of Memphis held these bills of lading as security that Green & Travis would accept the drafts, and after such acceptance were to hold the bills of exchange alone as security for their claim, would be a finding, without a scintilla of proof to support it, that the Bank of Memphis loaned one hundred thousand dollars and upwards upon the credit of a worthlesss drawer, and at best, an unknown acceptor.

(4.) To repel the natural and legal inference from the transfer of the bills of lading as security for the drafts, the defendants in the Court below were bound to show: —

(*a.*) An express agreement on the part of the plaintiffs, waiving their right to hold the bills of lading until payment.

No such express agreement will be claimed, and no proof of it was offered.

(*b.*) An implied agreement to that effect resulting from an express agreement between the drawer and drawee disclosed to the plaintiffs.

This has been negatived by the finding of the jury.

Record, p. 61.

(*c.*) An implied agreement resulting from a uniform course of dealing known to the plaintiffs.

This also the jury have negatived.

Record, p. 61.

(*d.*) An implied agreement resulting from a usage in the business.

But the defendants offered no evidence tending to show such usage; and the reason for their not doing so is apparent upon the record. *William A. Travis*, one of the firm on whom these drafts were drawn, called by the defendants as a witness, testifies, "Other drafts upon us came through other banks — Eliot, Blackstone, Second National, Tremont, Revere, and through the bankers Tower, Giddings & Torrey, — *never got bills of lading from any other banks or bankers without paying drafts. Not one of these banks delivered me bills of lading on acceptance, except the defendant bank.*"

The defendants thus disproved the existence of a uniform and binding usage or custom to deliver the bills of lading upon mere acceptance.

(*e.*) An implied agreement resulting from the facts in the case, showing an intent to rely on the credit of the drawees in case they should accept the drafts.

It has been already shown above that the facts support no such theory; and there was no evidence to contradict the testimony directly to the contrary.

(5.) But it will be contended that the mere fact that the Mulford drafts on Green & Travis were *time* drafts, drawn on thirty days, in itself indicated an intent on the part of Mulford to give a credit of thirty days to the drawees; that this intent was disclosed to the bank upon the face of the transaction by the drafts themselves; that the bank is thereby affected with notice, and so holds the bills of lading subject to an agreement to give the stipulated credit.

It is admitted that this theory finds support in the case of *Lanfear* vs. *Blossman*, 1 *La. An. Rep.* 148; and it is believed that this is the only reported case where the decision countenances the doctrine contended for by the defendants, or conflicts with the ruling of Judge Shepley in the case at bar.

We respectfully submit that *Lanfear* vs. *Blossman* is erroneous in law, and distinguishable in fact from the case now presented.

(*a.*) The Court was misled by the ingenious argument of Mr.

Benjamin, which is fully reported, and to which we refer, with confidence that the fallacy involved in it can be exposed.

The argument (pp. 151, 152) is, that where the drawer has sold the merchandise to the drawee, and the bills represent the price to be paid, which is the case here, "the term allowed by the bill of exchange indicates that the sale was made on credit. The holder of the bill of lading has assumed a mandate; to wit, that of completing the delivery of the goods sold. If so, he must deliver them when he asks the obligation or acceptance of the purchaser. *The sale on credit implies the right of the purchaser to the possession during the term of credit.*"

The whole argument rests upon this last statement; and the fallacy in the argument lies in this, that this statement is not true.

A sale on credit, where the vendor, by express stipulation at the time of sale, or by the course of business and nature of the transaction, retains the possession of the property as security for payment, does not imply but denies the right of possession of the vendee during the term of credit.

And to say that retaining a bill of lading, which is the sole evidence of title, in the hands of the vendor, or transferring it for value to one who advances the full price of the goods upon it, does not indicate an intent to retain possession of the property, is begging the whole question involved in the case.

A time draft, though it indicates a term of credit given for payment, does not of necessity involve the giving a *personal* credit or confidence solely to the drawer before acceptance, or to the drawer and drawee after acceptance; and taking the whole transaction together, the simultaneous delivery of the draft and the bill of lading as its security, it is plain that when the bank received notice, by the terms of the bill, that the time of payment was fixed at thirty days from date, it also received notice that it was secured by the cotton to which it held the title.

If the drawer, having first procured acceptance of the draft, had transferred it thus accepted to the bank, and had at the same time transferred the bill of lading, there would be no pretence that fixing a time of payment by the tenor of the bill indicated a personal credit given to the parties to it.

How does the fact that when the bank took the draft with the security, it was uncertain whether it would or would not be accepted, render it any the less entitled to hold its security until payment, than if the acceptance had been already given?

The bills of lading were, at the inception of the contract, held as security for the promise of the drawer, who wished a credit upon the strength of the security so given. Upon acceptance they continued to be held as security for the promise of the drawee, who equally desired a credit, and who could readily acquire possession by payment if he did not desire such credit.

From Mr. Benjamin *arguendo*, whom the Court followed in Lanfear *vs.* Blossman, appeal may be taken to Mr. Benjamin, the juridical writer; and by reference to pages 288, 289 of his able work on sales (2d edition), it will be apparent that in his elementary statement of the questions ordinarily arising upon bills of lading as security for bills of exchange, he clearly recognizes the right and practice of retaining the one as security for *payment* of the other, although a term of credit be given by the bill of exchange.

It may well be doubted whether the conclusion which the Court reached in *Lanfear* vs. *Blossman*, as to the commercial character and negotiability of bills of exchange accompanied by bills of lading, will commend itself to this Court.

The process of reasoning by which it arrived at the result that bills of lading attached to bills of exchange must be surrendered on acceptance, led also to the result that such a bill, though it "*may be called a bill of exchange, wants the requisites which alone give it value and circulation as such.*"

See Opinion, p. 159.

And again: "*These bills are entitled to no credit, and ought to receive none as constituting a part of the commercial currency. They have a consideration coupled with them which strikes at the very root of their availability, and those who take them cannot complain of the hazards to which they think proper to expose their business.*"

See Opinion, p. 160. — p 272 –

Benjamin on Sales –
First Edition

This language certainly presents a somewhat striking contrast to that of Chief Justice Taney upon a kindred question, as above cited, from *Gibson* vs. *Stevens*.

(*b.*) But the point upon which the case now presented is distinguishable *in fact* from *Lanfear* vs. *Blossman*, is one which is also conclusive upon the question of law, whether the bank was bound by notice of a credit given to the vendee.

In Lanfear *vs.* Blossman the drafts were on sixty days *after sight;* and therefore a clear credit or term for payment was inevitably given of sixty days after presentment and acceptance of the bill.

But in our case, the bills being drawn on thirty days from *date*, the bank had the undoubted right to withhold presentation of the drafts until their maturity, and had therefore the right to make the demand for acceptance and payment simultaneous. It is impossible to say that the parties contemplated a term of credit during which the property should be in possession of the debtor, where by the very nature of the transaction the vendor, or the bank his assignee for value, had the undoubted power and right thus to make payment and delivery simultaneous and dependent.

(*c.*) It is evident throughout the whole discussion in *Lanfear* vs. *Blossman*, that great stress is laid on the fact that the acceptors were in undoubted credit; and it was conceded that the holder of the bill of lading had the right to retain it as security for payment, not only in case of the actual insolvency, but of the *imminent* insolvency of the acceptor.

It is impossible to establish a definite and certain rule of law, if the rights of the parties are to be after all determined by the existing state of credit of one of them as the time when those rights are to be fixed; and it is apparent that the case of *Lanfear* vs. *Blossman* may have been determined too much upon the special circumstances of the case to make it a binding authority.

The practice of a quarter of a century since that decision, has rendered somewhat more certain the rights and relations of parties in what was then spoken of as "a course of business which has of late years grown up in this city in operating the change of ownership of the produce shipped to this mart for sale."

It is not believed that at this day bills drawn against produce with bills of lading attached would be held not negotiable, or styled "*hybrid instruments;*" nor that the right of the holder of such a security to instruct his agent to hold it as security until payment would be seriously questioned.

(*d.*) The fact that no usage could be satisfactorily proved in the case now pending, or in *Lanfear* vs *Blossman*, or *Coventry* vs. *Gladstone*, R. 4 Eq. 493, where it was attempted, is easily accounted for upon the theory that the vendor or his assignee for value has the right to retain the bill of lading until payment, but is inconsistent with the contrary theory.

Where it is understood that the right exists to retain, it is manifest that the right would nevertheless be waived in numerous instances. In the case of cotton drafts for example, drawn upon well-known purchasers, such as our large manufacturing corporations, whose credit is as well established and whose means are as extensive as the bank which is employed as collecting agent, a loose practice would easily grow up of surrendering the bills of lading upon acceptance of the drafts. It is believed that the existence of the question to be determined by the result of this suit arises from the variance in mercantile usage which has grown up in this manner.

But, on the other hand, if it were once established as the uniform practice to deliver bills of lading on acceptance, that custom would never be departed from; as such departure by a refusal to deliver would at once raise the issue as to the rights of the parties.

(6.) Besides *Lanfear* vs. *Blossman* it is believed no case can be found which decides that the holder of a bill of lading attached to a draft drawn for the purchase money of the goods is bound to surrender the bill of lading to the purchaser upon his acceptance of the draft.

There are cases in which *dicta* to that effect may be found; or where such doctrine may be implied from the language used; but they are cases in which, for the determination of the case, it was only necessary to hold that the title to the bill of lading would not pass until after acceptance; and inasmuch as acceptance was wanting it was not and could not be essential to the decision to hold anything further.

This was the case in Shepherd *vs.* Harrison, in Gurney *vs.* Behrend, 3 E. & Bl. 622, and in Marine Bank of Chicago *vs.* Wright, 48 N. Y.; and notably so in Cayuga Bank *vs.* Daniels, 47 N. Y. 631, in which case it will be found that although Mr. Justice Grover in one part of his opinion (p. 638) treats the bill of lading as held for security for acceptance, he, with equal distinctness, in another part of his opinion (p. 637) says, that discounting a draft with bill of lading attached shows the intent that delivery to the carrier should vest title in the consignees only "on condition that they accepted *and paid* the drafts."

It will be noted also that the leading case in New York, to which reference is made in all the succeeding cases, viz. *Bank of Rochester* vs. *Jones,* 4 *Comst.* 497, is one where the bill of lading was pledged for payment and not for acceptance merely.

Coventry vs. *Gladstone*, L. R. 4 Eq. 493, is not adverse to the plaintiffs' claim. It turned upon the question whether the delivery of the bill of lading by the defendant's messenger, on acceptance of the draft, was binding on the defendant; and it was held to be so. The case called for no decision whether the acceptor could have demanded the bill of lading on acceptance and could have enforced his demand if refused.

The case, however, was one which carried with it a strong inference of intent to give credit, as the bills were drawn on six months.

Gurney vs. *Behrend*, 3 *Ell. & Bl.* 622, is not in point: —

(*a.*) The draft and bill of lading were not attached, but were in different hands, so that acceptance even was never made a condition of title under the bill of lading.

(*b.*) The case was one where the vendor had agreed distincly upon a credit not dependent upon the property, viz. a banker's credit; and it was held that the purchaser "having lodged the credit according to his undertaking, was immediately entitled to have the bill of lading delivered up to him." p. 636.

(*c.*) The remarks of Mr. Justice Crompton as to its being unusual to hold the bill of lading as security, apply equally to a holding for acceptance and to a holding for payment. p. 630.

(7.) The later authorities in England and in this country hold in terms, or decide by direct and necessary implication, that the holder of a draft, discounted *bonâ fide* for value, with bill of lading attached, holds it as security for payment and not for acceptance merely.

Directly in point are

Gilbert *vs.* Guignon, L. R. 8 Ch. 16 (1872).
Seymour *vs.* Newton, 105 Mass. 272.
Newcomb *vs.* Boston and Lowell R. R., 115 Mass, 230.
Stollenwerck *vs.* Thacher, 115 Mass. 224.

In Seymour *vs.* Newton a draft was drawn at three days' sight against goods bought by the shipper in Chicago, upon the order of a purchaser in Worcester. The draft was discounted at a bank in Chicago, and a railroad receipt for the goods taken in the name of the cashier of the bank, by whom draft and receipt were forwarded to a bank in Worcester for collection. The draft was accepted, but protested for non-payment.

It was held that delivery to the carrier preserved the title in the bank: " *The obvious purpose was that there should be be no delivery to the vendee till the draft should be paid.*

Chief-Justice Chapman's opinion, p. 275.

In *Stollenwerck* vs. *Thacher*, the title of the shipper was maintained after acceptance of the draft, even against a transfer of the bill of lading, which had been surrendered by the agent of the drawer without authority to do so. But the decision involved the right of the drawer, and of the bank which discounted his draft, to hold until payment.

In *Gilbert* vs. *Guignon*, and in *Newcomb* vs. *Boston and Lowell Railroad*, it will be found, on close analysis of the facts, that the title under a discounted draft, with bill of lading attached, was sustained as against the title of one who purchased from the drawee after acceptance. The one case was upon drafts payable in sixty days after sight; the other upon a sight draft.

(8.) In the court below great stress was laid upon the argument *ab inconvenienti*.

The inconvenience which would result from the bank holding the title until maturity of the drafts, is one easily remedied by the employment of an agent to receive actual possession and charge of the property; but, as it appears in evidence in this case that cotton is usually from twelve to thirty days in transit from Memphis to Boston, such inconvenience would hardly arise upon the transactions now in question.

The large number of reported cases in which, by special agreement, bills of lading have been held as security for payment shows that there is no great practical difficulty which would require the rule of law to be varied in order to avoid it.

See, for example, Jenkyns *vs* Brown, 14 Q. B. 496. The Thames, 14 Wall. 98, in both which cases it was held that the facts showed an agreement that the bill of lading should be held for payment, and not merely for acceptance.

This case itself affords the best illustration that business would not be seriously impeded by the practice of requiring payment before delivery of the bills of lading; for it appears, as before stated, that out of seven banks through which Green & Travis received their drafts, the defendant bank was the only one which surrendered the bills upon mere acceptance.

In *Lanfear* vs. *Blossman*, it is said by the Court that "in relation to bills of exchange drawn in the East Indies and accompanied by bills of lading, the usage to retain the bills of lading until payment of the bill is proved to exist," p. 155; and *Gurney* vs. *Behrend* shows also a frequent though not a uniform usage to that effect

Latham *vs.* Bank of India, L. R. 17 Eq. 205, may be cited as, perhaps, the latest case showing that the practice still prevails as to India bills.

(9.) Nor is there force in the objection that by requiring acceptance without surrender of the bills of lading the bank holding the documents retains both the promise of the acceptor and the property which was the consideration for the promise.

(*a.*) Such an arrangement is the usual one made with banks which advance money upon collateral security.

The acceptor asks for a credit, and leaves as his security for it the bill of lading which the drawer has deposited; and there is nothing unreasonable or unusual in requiring him so to do.

(*b*.) The bank which holds the bill of exchange and the bill of lading attached, "for collection," holds them in trust for both parties, and is under equal obligation to each not to detach one from the other.

The present course of dealing in England, where bills of exchange are sent with bills of lading attached "for presentation and collection," appears to be that the bank upon acceptance of the bill of exchange affixes to it a memorandum stating that it holds the bill of lading.

Leather *vs.* Simpson, 11 Eq. 398.

But without such memorandum the obligation rests upon the bank, in favor of the acceptor, not to separate the promise from the receipt.

Upon the grounds thus stated, and authorities cited, it is claimed that the inference to be drawn, as a conclusion of law, from the transactions between Anderson and Mulford and the Bank of Memphis and Green and Travis is, that the bills of lading of the cotton were held by the bank as security for the payment of the drafts; that the record discloses no evidence tending to repel this presumption of law, either by reason of any express or implied agreement or waiver of right by the bank; especially that nothing in the transaction nor in the evidence tends to establish any intent of the bank to rely on the personal credit of the parties to the drafts; that no direct authority, except the single case of *Lanfear* vs. *Blossman* exists, supporting the proposition that the mere giving of time by drafts drawn on the vendee indicates an intent to rely on his personal credit and to surrender the security of the bill of lading; that the facts in that case distinguish it in a vital point from the case now presented; that the reasoning and the result reached in it are unsatisfactory; and that it is at direct variance with numerous and later and better authorities; and that the enforcing of title under bills of lading as security for payment is not only in accordance with the true principles of law, but is practicable, reasonable, and in conformity with widely extended usage in the mercantile world at home and abroad.

B.

The Bank of Commerce was not authorized to separate the bills of lading from the bills of exchange, and to surrender them before the bills of exchange were paid.

I.

The two securities were in each case attached together, and sent together "*for collection.*" Without further specific instruction, and without any implied consent to any other course, the existence of which has been negatived by the jury, it would seem too clear for argument, that if the legal right of the bank transmitting the two was to hold the bill of lading as security for, and until, payment of the bill of exchange, it became the duty of the bank receiving them and undertaking the agency to enforce that right, and not to waive or surrender it.

The Bank of Commerce assumed the duty of presenting the drafts for acceptance, and of collecting them at maturity; it held in its possession property or the symbol of property, which by force of law, and by legal inference from the facts disclosed upon the face of the documents themselves, was security to its principal for the payment of the debt; it accepted a promise instead of payment; and must become bound for the loss which ensued.

II.

In fact, upon this point, no exception is open for argument upon the record.

This cause, as the record shows, was tried in the Court below upon two issues.

The first issue was as to the right of the Bank of Memphis to retain the bills of lading as security for payment, as affected by the alleged agreement of Mulford and Anderson with Green and Travis.

The instructions of the Court sustained that right as valid, provided such agreement was not disclosed to the Bank of Memphis.

To this ruling the defendants may fairly be said to have excepted, under their exception to the refusal of the Court to give the first instruction asked at the close of the whole evidence; and this exception has been considered under heading A in this brief.

The second issue was as to the liability of the Bank of Commerce for surrendering the bills of lading in case the Bank of Memphis was entitled to hold them.

Upon this point the only contest was, and the only instructions asked, were, with reference to the effect of notice to the Bank of Memphis or to the Metropolitan Bank, its agent, that the Bank of Commerce was in the practice of surrendering the bills of lading upon acceptance.

To the instructions given upon what would constitute such notice, or what would be its effect, no exceptions were or could be taken, for they were favorable to the defence.

Upon the question of the liability of the defendants, in case the jury should find, as they did find, that the Bank of Memphis was not affected with notice, the defendants asked no instructions and excepted to none.

The defendants cannot avail themselves of their general exception to the judge's charge to sustain a point now for the first time taken, to which the attention of the Court was not specifically directed at the trial, and upon which no specific objection was made to his ruling.

Johnston *vs* Jones, 1 Black, 209.
Rogers *vs.* The Marshal, 1 Wall. 644.
Harvey *vs.* Tyler, 2 Wall. 328.
Lucas *vs.* Brooks, 18 Wall. 436.

That portion of the judge's charge, which is set forth in the record, contained a series of propositions, as to some of which the defendants cannot dispute their soundness or accuracy. Their exceptions being to the whole series, *en masse*, cannot, upon the authorities above cited, be entertained by the Court, or sustained, even though there be error in some of the series.

C.

It cannot be contended upon this record that the question of intent as between Mulford and Anderson and the Bank of Memphis, or as between the Bank of Memphis and Green and Travis, whether the bills of lading should be surrendered upon acceptance, or held for payment of the drafts, should have been submitted as matter of fact to the jury.

I.

The case upon this point stands upon the naked transaction between the parties, and the inference of law to be drawn therefrom; it rests wholly upon written documents, and undisputed facts. In such case there is nothing for the jury.

Toland *vs.* Sprague, 12 Pet. 300.
Brown *vs.* M'Gran, 14 Pet. 479, 493.
Turner *vs.* Yates, 16 How. 14.
Bevans *vs.* United States, 13 Wall. 56.
United States *vs.* Stockwell, 4 Cranch C. C. 671.
Key *vs.* Cotesworth, 7 Exch. 595.
Nat. Bank of Cairo *vs.* Crocker, 111 Mass. 163.

The last two cases cited are directly in point, arising upon transactions of a similar nature to those involved in the case at bar; and in the Massachusetts case the Court will note that it was reserved expressly upon the point whether it should have been submitted to the jury. See p. 165.

II.

The point that the question of intent should have been submitted to the jury is not open upon the record.

No instructions were asked upon the question of intent, and no request made that the question should be submitted; the attention of the Court was in no way called to the question either before or after the charge, and no specific objection was raised to the instructions given or omitted.

No exception therefore was taken, upon this point, under which error will lie.

Shutte *vs.* Thompson, 15 Wall. 151.
Johnston *vs.* Jones,
Rogers *vs.* The Marshal,
Harvey *vs.* Tyler,
Lucas *vs.* Brooks, } *ubi supra.*

W. G. RUSSELL, *for Defendants in Error.*

Supreme Court of the United States.

THE NATIONAL BANK OF COMMERCE, OF BOSTON,

PLAINTIFF IN ERROR,

vs.

THE MERCHANTS' NATIONAL BANK, OF MEMPHIS,

DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

SAM'L DICKSON,
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In the Supreme Court of the United States.

THE NATIONAL BANK OF COMMERCE, OF BOSTON, Plaintiff in Error,

vs.

THE MERCHANTS' NATIONAL BANK, OF MEMPHIS, Defendant in Error.

STATEMENT OF THE CASE.

The National Bank of Commerce, of Boston, plaintiff in error, received from the Metropolitan National Bank, of New York, three drafts, with bills of lading annexed, "for collection." No special instructions were given, and on the acceptance of the drafts by the drawees, who were then in good credit, the bills of lading were surrendered. It appeared that the drafts had been forwarded by the Merchants' National Bank, of Memphis, by which bank they had been discounted, though this fact was not known to the Boston bank; and it was specially found by the jury that it had been agreed between the drawers and drawees that the bills of lading should be surrendered on acceptance, which fact, however, was not known to the Memphis bank at the time of discount.

No evidence was given of any *special* hypothecation of the bills of lading when the drafts were discounted, nor did it appear that there was any other pledge than that which would be implied from their having been attached to the drafts when offered for discount.

The learned judge ruled that such a pledge was intended as a security for the payment as well as the acceptance of the drafts, and that where "the bill of lading is pasted or attached to the bill of exchange, the bank receiving the two papers 'for collection' would not be authorized to separate them and surrender the bill of lading before the bill of exchange was paid."

ARGUMENT.

The question raised by this record is one of unusual importance to the commercial interests of the country. It is a part of the business of every bank to receive bills, notes, and checks from its depositors and correspondents for presentment and collection. The indirect compensation obtained, in the chance of securing temporary deposits, has been held a sufficient consideration for the undertaking to perform the service, although the fact that the immediate compensation is but nominal has been regarded as a reason for exempting the bank from liability for the negligence of a sub-agent, employed from necessity or even as a matter of convenience, if such delegation be sanctioned by usage. (Bellemire *vs.* Bank, 4 Wharton, 105; Bank *vs.* Bank, 1 Cush., 177; Montgomery County Bank *vs.* Albany City Bank, 7 New York, 459.) The burden thus imposed is a serious one, and as, in the transaction of business of this sort, prompt action is always necessary, it is specially desirable that the rules, which are to govern it, should be as plain and certain as it is possible to make them. The compensation paid even by a stranger is a nominal one, intended only to cover the expenses of correspondence, and to a regular correspondent no charge is made. However substantial may be the incidental reward to the bank, the advantage to the community is more than commensurate, and the business of the country could hardly be conducted if such facilities were taken away, while "the responsibility of an unpaid agent is so far inferior in degree that he is not bound for ordinary skill nor liable for anything less than gross negligence:" Bellemire *vs.* Bank, *ut supra.* Considerations of this sort can never be irrelevant when they assist the court to understand and appreciate the relative positions of the parties, and thus to balance and adjust conflicting equities; and the liability of the plaintiff in error cannot be justly determined without adverting to the circumstances under which it was called upon to assume the duty, in the discharge of which it is said to have been negligent. No special instructions were given, and if it shall not be demonstrated that it did its whole duty, as it is believed it will be, at least it will be shown that it made no such clear, plain, and willful mistake as should alone render a gratuitous bailee responsible. If any mistake were committed, it was due to negligence on the part of the owner of the draft in not giving specific instructions, and it would be in conflict with the elementary doctrines on the subject of the law of agency to impose a liability, not for the want of ordinary care, but for an error of judgment in a position of great difficulty and doubt. This is text-book law.

In his work on Agency, Mr. Justice Story says:—

"There is another consideration, highly important, to be borne in mind in the interpretation of written instruments, and especially of those of a commercial nature, such as letters of instruction or orders, and that is, that, if the instrument is not expressed in plain and unequivocal terms, free from ambiguity, but the language is fairly susceptible of different interpretations, and the agent in fact is misled, and adopts and follows one, when the principal intended the other—there, the principal will be bound, and the agent will be exonerated. For, in such a case, the agent has acted in good faith, and within the supposed limits of his authority; and if one of two innocent parties must suffer, he ought to suffer in preference who has misled the confidence of the other into an unwary act. In cases of doubt, the general rule is, that the words are to be construed most strongly against the writer. *Verba fortius accipiuntur contra proferentem.*" —Sec. 74.

"In other respects, commercial instruments, such as orders and letters of instruction, are generally construed with great liberality, and free from technical rules, for the satisfactory reason, that they are generally drawn in a loose and inartificial manner, and are designed to subserve the common purposes of life and business, and leave much to be gathered from the usages of trade and the practice of employments."—Sec. 75.

"In the next place, it may be laid down as a general rule, that where an express authority is conferred by informal instruments, such as letters of advice or instructions, or loosely-drawn orders, especially where they are general in their terms, or confer a general authority, they are construed with more liberality than more formal and deliberate instruments. This rule is adopted for the convenience of merchants; and, indeed, seems indispensable to general confidence and security, in the ordinary operations of commerce and navigation and trade. The Roman law inculcated an equally comprehensive doctrine: *Ideo per nuncium, quoque vel per epistolam, mandatum suscipi potest. Si quis alicui scripserit, ut debitorem suum liberet, seque eam pecuniam, quam is debuerit, soluturum, mandati actione tenetur. Item, sive rogo, sive volo, sive mando, sive alio quocumque verbo scripserit, mandati actio est.*"—Sec. 82.

"In all such cases, whether the agency be of a special nature, or of a general nature, it may also be laid down as a universal principle, that it includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the objects and ends of the agency. And even a deviation by the agent from the appropriate course will not vitiate his act, if it be immaterial or circumstantial only, and does not, in substance, exceed his right and duty. Indeed, a literal adherence to the common course of business may sometimes, under peculiar circumstances, defeat the very objects of the agency; and new and unexpected emergencies and necessities of such a critical nature may arise, as, if one may use the expression, will expand the authority beyond its ordinary limits, and justify even a deviation from its ordinary limitations and imports."—Sec. 85.

It is true that these remarks are more immediately intended to apply to the rights of third parties dealing with agents under such circumstances, but they are equally pertinent where the question is directly between the principal and agent. When, therefore, a bank receives from its correspondent a time draft, with a bill of lading attached, no special instructions having been given, it is obvious that all that can be demanded is, that it shall act with reasonable discretion, in view of the means of information in its possession. The actual facts not having been communicated, it must suffice if the bank shall use ordinary prudence in the use of such information as is furnished upon the face of the papers; or, as was said by Gibson, C. J., in Bellemire *vs.* Bank, *ut supra*, "it is sufficient to exonerate it, that it has acted in good faith, and though not to the best advantage, according to the regular and accustomed course of the business." The question in the case thus becomes, in a great measure, one of fact, viz.:—What is the natural or probable implication from such documents as were here transmitted?

It is submitted that the plain import was that there had been a sale of the cotton, payable in the time drafts drawn by the vendor upon the vendee, and that the acceptance of such drafts would constitute payment, and that the papers had been sent forward for delivery in fulfillment of such contract. This will become apparent, whether regard be had to the essential character of a bill of exchange or of a sale upon credit.

I. First, as to the implication from the drawing of a time draft against the consignment.

Beyond all question, it was the duty of the bank to present the draft for acceptance, and if the facts were that the sale had been made payable in the accepted draft, it is plain that the refusal to surrender the bill of lading would have justified the vendee in rescinding the contract, or entitle him to maintain trover, (if the rights of third parties had not intervened,) as would be most to his interest, while the demand for acceptance, upon conditions which could not be exacted, would not have justified protest, but would, on the contrary, have discharged all previous parties to the drafts. It will be conceded that from the drawing of the bill against the consignment the consideration of its acceptance and payment was to be the delivery of the goods at one or the other time. In theory, the drawer of the bill draws against funds in the hands of the drawee. In the case of a drawing, therefore, on time against a consignment, if that be known without more, the natural import would be that the goods were to furnish the proceeds, out of which to pay the draft at maturity. If the dealings between the parties were confined to this single transaction, such would certainly be the understanding upon both sides, and such, in the vast majority of cases, is the real nature of the dealing. Drafts of this sort, like notes given in payment for goods bought, constitute what are known to bankers and brokers as "business paper." They represent real transactions, and as presumably the buyer disposes of the goods at a profit, he is put in funds by the resale to meet his bill or note at maturity. But if the acceptor is to be denied possession of the goods, and thus be prevented from selling or pledging them, he is deprived of the very resource out of which he was to obtain the means of payment. Hence it was held, in Mason *vs.* Hunt, 1 Doug., 297, that where the drawee accepted in consideration of a future consignment, and the holder, with knowledge of that fact, received and retained the bill of lading, he discharged the acceptor.

So also it was held in a case precisely in point, that where a a bill of exchange, drawn on a shipment and payable a certain number of days after sight, is sold, with the bill of lading appended to it, the holder of the bill of exchange cannot, in the absence of proof of any local usage to the contrary or the imminent insolvency of the drawee, require the latter to accept the bill of exchange, but on the delivery of the bill of lading; and where, in consequence of the refusal of the holder to deliver the bill of lading, acceptance is refused, and the bill protested, the protest will be considered as made without cause, the drawee not having been in default, and the drawer will be discharged. An instrument with such a condition appended to it is not strictly a bill of exchange; it wants the essential requisite of being negotiable and payable, at all events, independent of its consideration. Lanfear *vs.* Blossman, 1 La. An. Rep.

The observations of Eustis, C. J., might be presented as the argument on behalf of the plaintiff in error, and his remarks as to the manner in which cotton bills were sold in New Orleans, are of peculiar importance, as it will be seen that, in the shipment of cotton to England, it has been not uncommon to *specially* pledge the bill of lading to the purchasers of the bill of exchange, and thus authorize its retention if the acceptance should not be satisfactory.

The primary duty of the bank having been, therefore, to obtain acceptance, it would have been a clear violation of that duty for it to insist upon a condition which would have justified the drawee in refusing acceptance.

II. It is a necessary implication from such documents that the cotton was sold on credit, payable in the accepted draft, and if such be the fact, the vendor, and those claiming under that contract, have no right to retain possession of the goods till the expiration of the credit.

Undoubtedly, so long as the vendor retains possession and control of the goods or their symbol—the bill of lading—he can make a good sale or pledge to a third person; and it is not intended to deny that a *bona fide* purchaser or pledgee would be entitled to retain the goods, leaving the disappointed vendee, when delivery was refused on his tender of acceptance, to his remedy against his vendor for breach of contract; but surely, where the drawing of a time draft against a consignment raises the implication that the goods have been sold on credit, the agent, to whom the draft to be accepted and the bill of lading to be delivered have been intrusted, is neither required nor permitted to assume that the transaction is not what it appears to be,—that the vendee's term of credit must expire before he can have the goods; but that, in the meantime, he must assume the responsibility of accepting the draft, and trust to the future to get the goods for and on which it was drawn. The circumstance that the draft was sent to the agent "for collection" cannot vary the case, except in so far as those words exclude the idea that the bank was the owner of the draft. In Sweeny *vs.* Easter, 1 Wallace, S. C., 166, such an endorsement was held to indicate agency and to restrain the negotiability of paper so endorsed. But even if this were not so, the procuring of the acceptance of the drawee was a preliminary step in the collection of the draft. It could hardly be supposed that the drawee would accept the draft until the bill of lading had been delivered to him; and if the agent had defeated the collection of the draft by insisting upon retaining the bill of lading, and a subsequent depreciation of the goods had rendered them an insufficient security for the advance made on the draft, the agent might well have been held responsible.

The error of the court below consisted in the assumption that in the absence of any special agreement between the Memphis bank and the drawers, the drafts were, as a matter of law, pledged for the ultimate payment, and not the acceptance of the drafts, and that the Boston bank could escape liability for the premature surrender of the bills of lading only by showing that the former bank had either expressly or impliedly agreed that they should be given up when the drafts had been accepted.

This view of the case begs the very question to be determined,—ignores the obligation of the Boston bank to procure the acceptance of the drafts, (which could not have been reasonably expected, unless upon the surrender of the bills of lading,) and the fact that the sale of the cotton having been on credit, the immediate delivery of the cotton to the purchasers and drawees of the draft was of the very essence of the contract.

Considering the banks by whom the papers were forwarded as the agents and representatives of the vendor, such a sale gives no right of lien upon the goods as security for the ultimate payment of the price. Such a right may be expressly stipulated for and may be thereby secured, but without express reservation it would not exist.

A leading case on the right of lien is Cowell *vs.* Simpson, 16 Ves., 275, in which it was ruled that a solicitor who takes a security forfeits his lien on the papers of his client.

In the course of his opinion, Lord Eldon made some remarks very pertinent in this discussion :—

"Where by the usage of trade a person has a lien on goods in his hands for work performed upon them, and farther, for work upon other goods not then in his possession, having been delivered over, according to the usages of different trades, it is settled by modern decisions that by taking a security the lien is gone, even with regard to the goods in his possession, and cannot accompany that special security which determines the implied contract. It is necessary to see upon what principle that stands. I rather think it is not regulated by the usage of trade. It has been accounted for in this way: that the lien is gone by the effect of the intention to substitute the special contract for the implied one: *the necessities of mankind requiring that the goods should be delivered for consumption, it is not to be presumed that the lien was to be extended through the whole period.*

* * * * * * * * * * *

"In various trades the demand being for work and labor, applied in some instances upon the particular goods, in others upon other goods also, though the possession had been given up, it is universally laid down that if that takes place under a special agreement, there is no such lien; and if it commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other. *The exigencies of mankind requiring the goods to be delivered for consumption, the implication from an engagement for security of an engagement to deliver the goods without payment is necessary; otherwise, from a promissory note, payable in three years, a contract must be implied, that the goods are to be retained during that period,—destroying the other special contract.*"—Page 279.

Commenting upon these observations, Lord Ellenborough said:—"In Cowell *vs.* Simpson, 16 Ves., 275, the lord chancellor considers a lien as a right accompanying an implied contract; and in one passage of his judgment he is reported to have said: 'If the possession commences under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other;' but it is evident, from other parts of the report, that the lord chancellor was there speaking of a special contract for a particular mode of payment. Such a contract is apparently inconsistent with a right to detain the possession; and, consequently, will defeat a claim to the exercise of such a right. And we agree that, where the parties contract for a particular mode or time of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract." Chase *vs.* Wetmore, 5 M. & S., 180.

In Rent *vs.* Mitchell, 4 Camp., 146, in which it was ruled that a shipwright in the Thames has no lien on a ship taken into his dock for repairs, without an express agreement,—credit being given by the usage of trade,—the same learned judge said:—

"To be sure, a lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money or there is a bargain that security shall be given the moment the work is completed. * * * But there can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired."

It is no longer the rule that a common-law lien will be waived even by a special agreement as to the price to be paid for the service to be performed on the property, but the agreement must be inconsistent with the lien itself (Brennan *vs.* Currint, Sayer, 224; Chase *vs.* Wetmore, 5 M. & S. 180; Met. Yelv., 66; Hatton *vs.* Bragg, 7 Taunt., 14); and the reason is that given by Lord Eldon in Cowell *vs.* Simpson, *ut supra*, or as it is expressed by a leading text-writer:—"The principle upon which the law considers the taking of a security as a waiver of the lien is not the result of a mere usage of trade or of rule of law that the special contract determines the implied one, but is prompted by the consideration of the inconvenience that would result from detaining the goods from the uses of trade by extending a lien during the whole period which the security has to run." Parsons on Contracts, vol. 1, 246–7.

The same doctrine applies to cases of the sale of personal property. It is true it was established in the leading case of Bloxam *vs.* Sanders, 4 B. & C., (10 E. C. L.,) 941, that while the right of property in the goods vests in the buyer, so soon as everything the seller has to do with them is complete, the right of possession does not pass till he pays the price; and if the sale is upon credit, "and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute—it is liable to be defeated if he becomes insolvent before he obtains possession."

In every case, however, where the right of detainer or of stoppage *in transitu* can be asserted, such right is exceptional and depends upon insolvency and non-delivery into the possession of the buyer. Granted a sale upon credit, without more, and, *ex vi termini*, the right to immediate possession must follow, and if such possession be once delivered the right to a lien is lost. Thus, if one sell goods on credit and the vendee deposit them with the vendor to be sold on his account, the vendor will have no lien for the vendee's debt to him. Houghton *vs.* Matthews, 3 B. & P., 485.

The property of goods passes by the endorsement and delivery of the bill of lading by the consignee to another *bona fide* for a valuable consideration and without collusion with the consignee, although the endorsee knew at the time the consignor had not received money payment for his goods, but had taken the consignee's acceptances payable at a future day, not then arrived, and after such assignment of the bill of lading the consignor cannot stop the goods *in transitu* upon the insolvency of the original consignee. Cuming *vs.* Brown, 9 East., 506.

"If we look to the actual facts of the case as between the consignor and consignee, by the memorandum at the foot of the invoice transmitted before the bill of lading, the price of the goods was payable in bill on London at three months from the 20th of December, and at the time of the assignment the consignee had done all that such a bargain required, by having accepted a bill on London at three months from the 20th of December, which was not due at the time of the endorsement of the bill of lading, on the 23d of February."—Ellenborough, C. J.

And in Spartali *vs.* Beneke, 10 C. B., 212, it was *held* that where a contract of sale contained the following stipulation:—"Customary allowance for tare and draft, and to be paid for by cash in one month, less five per cent. discount," the vendee was entitled to have the goods delivered to him immediately or within a reasonable time, but was not bound to pay for them till the expiration of the month. See also, Arnold *vs.* Delano, 4 Cush., 33.

This doctrine will hardly be disputed, and reference is made to authorities so familiar only to show that, except in cases of insolvency, the policy of the law is against any claim of which the necessary result is to limit and restrain the free use and disposition of the subjects of traffic; and that the burden is on him who asserts such a claim to establish and make it out, and this is just as necessary when the form of the transaction is a consignment by the vendor to the vendee, with the bill of exchange drawn against the bill of lading, as in any other case. As between vendor and vendee, the necessary implication is that the price was the accepted draft, and in the absence of an express agreement of pledge, superadded to that of sale, the purchaser is entitled to immediate possession on tender of acceptance, because there can be no pretense of right to ask his acceptance except as a performance of his part of the contract of sale, and certainly *his* rights were an element in the case not wholly to be disregarded. In the cases to which reference will be made, and which are admirably summarized by Mr. Benjamin in his treatise on "Law of Sale of Personal Property," the question has usually arisen between the consignor and the representatives of the consignee in case of an attempted stoppage *in transitu*, or between the consignee and some third person claiming title under a sale or pledge from the vendor. Unquestionably it is now well settled that, where the consignor has clearly shown an intention to reserve the *jus disponendi*, the mere delivery of goods to a common carrier, even though bought to order, and the carrier is the vessel of the vendee, will not vest the property in the vendee; and, as was said by Baron Parke, in Van Casteel *vs.* Bowker, 2 Ex., 691, 708, "the fact of making the bill of lading deliverable to the order of the consignor is decisive to show that no property passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods till he did a further act," and to the same effect are Bank *vs.* Jones, 4 N. Y., 501, and other American cases. It is not disputed, therefore, in the present case, that the consignor reserved the right of property, and that, if acceptance had been refused, he would have been entitled to rescind the contract or remitted to all the remedies of the unpaid vendor. Nor is it disputed that if he had sold or pledged the property to another, that third person would have been entitled to retain possession of the goods, and deal with them as his own, provided that he had given sufficient notice of his title. The question here is, first, as to how far the right of property was reserved, and whether it was not only so far as would be sufficient to insure the fulfillment of the contract according to its terms—that is, to secure the acceptance of the draft as the price of the goods; and, secondly, whether the transmission of the draft to the consignee for collection, in accordance with the contract, was not a waiver of any rights as purchaser or pledgee, if such existed. One who chooses to step into the shoes of the consignor and to present himself as his representative, under the contract of sale, must ratify that contract in whole or tender to the consignee his option of repudiating what would be a new contract. By requesting performance on the part of the vendee, he must be taken to ratify the original contract, as made, unless expressly calling attention to some variation in its terms, and his agent has the right to rely upon this presumption. Upon the same principle, it was said by Church, C. J., in a recent case:—"If A has property upon which he has received advances from B, under an agreement that he will ship it to B to be sold to pay the advances, or to pay any indebtedness, he may or may not comply with this contract. He may ship to C or to B upon conditions; but if he ships to B in pursuance of his contract, the title vests in B upon the shipment." Bailey *vs.* R. R. Co., 49 N. Y., 10.

Now, in every case in which goods have thus been consigned under a bill of lading, with a bill of exchange attached, it is conceded that the consignee had the right to the possession of the goods upon the delivery of his acceptance, unless some course of dealing or special agreement was shown which would deprive him of that right.

Thus, "Where the consignor of goods abroad advised the consignee by letter that he had chartered a certain ship on his account, and enclosed him an invoice of the goods laden on board,—which were therein expressed to be *for account and risk* of the consignee,—and also a bill of lading in the usual form, expressing the delivery to be made to order, or *he paying freight for the said goods according to charter-party;* and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo; held that the invoice and bill of lading sent to the consignee and the delivery of the goods to the captain, vested the property in the consignee subject only to be divested by the consignor's right to stop the goods *in transitu* in case of the insolvency of the other. And the consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptance at three months in the manner before stipulated, *held* that the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, the defendant having possessed himself of the goods wrongfully." Walley *vs.* Montgomery, 3 East., 585.

So, too, in the important case of Brandt *vs.* Bowlby, decided in 1831, it is assumed and conceded that, if the consignee had accepted or tendered acceptance, the property in the goods would have immediately vested in him.

In delivering the opinion, Parke, J., said:—"The fact of their transmitting an unendorsed bill of lading to Berkely, and an endorsed one to Harris & Sons, shows clearly that they did not intend that the property in the wheat should vest absolutely in Berkely, but should be subject to a condition that the bills were accepted. As they were not accepted, Berkely has not performed the condition on which the vesting of the property in him was to depend, and, *therefore*, it never did vest in him." Brandt *vs.* Bowlby, 2 B. & Ad., 932. (22 E. C. L., 390.)

The case of Wilmshurst *vs.* Bowker figures several times in the report.

Defendants sold to plaintiffs wheat, for which plaintiffs were to pay by a draft on a London banker. Defendants delivered the wheat to a carrier, and sent the bill of lading to plaintiffs, but took the wheat again and sold it before it came to plaintiffs' possession, because plaintiffs failed to send a draft on a London banker. Held that plaintiffs could not sue defendants in trover for the wheat. Wilmshurst *vs.* Bowker, 5 Bing., N. C., 541.

"Admitting that the contract of sale vested the property of the wheat in the plaintiffs, yet, before they acquired the right to the possessson of the wheat, the plaintiffs were bound by the terms and condition of the contract, upon the receipt of the invoice and bill of lading of the wheat, to remit to the defendants a banker's draft on London at two months' date, which they altogether failed to do. It was a condition obviously introduced for the security of the defendants, that they should not part with the possession of the wheat until the banker's draft was remitted, and for this purpose the receipt of the invoice and bill of lading by the plaintiffs, and the remitting of the banker's draft by them, are made by the terms of the contract concurrent acts, and consequently the entire failure in the performance of the latter act on the part of the plaintiffs prevented the right of possession of the wheat from vesting in them."—Tindal, C. J.

This case came a second time before the court upon a plea to another count in the same declaration, averring that the defendants had caused the wheat to be stopped in its passage, to which the third plea set up in substance that the wheat had been sold upon condition that payment should be made by banker's draft on London at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs of the invoice and bill of lading; that the plaintiffs received the invoice and bill of lading, and did not remit any banker's draft, whereupon the defendants caused the wheat to be stopped.

The declaration alleged that the plaintiffs were neither bankrupt nor insolvent, and no traverse was taken on that allegation.

The question was stated by Tindal, C. J., as "whether, under the particular terms of this contract, the consignors have not reserved to themselves the power of withholding the actual delivery of the wheat until the consignees should comply with the mode of payment stipulated in the contract. There is no doubt that the *property* in the wheat passed to the plaintiffs under the contract, upon which much of the agreement before us turned; but the question is as to the intention of the parties as evidenced by the contract, with reference to the *delivery of possession*. And we are of opinion that the intention of the parties, under this contract, was that the consignors should retain the power of withholding the actual delivery of the wheat in case the consignees failed in remitting the banker's draft, not upon the delivery of the wheat, but upon the receipt of the bill of lading, which, in the ordinary course of business, would precede arrival or delivery of the wheat; and we think the object of making the receiving of the invoice and bill of lading and the remitting of the banker's draft to be simultaneous or concurrent acts could have been no other than to afford security to the consignors, so that in case the consignees failed in the performance of the latter stipulation, the consignors might withhold the actual delivery of the cargo." Wilmshurst *vs.* Bowker, 2 M. & G., 792. (40 E. C. L.)

In the Exchequer Chamber, 7 M. & G., 882, (49 E. C. L., page 881,) this judgment was reversed on the ground that by the delivery of the wheat to the master of the vessel, for the account and at the risk of the consignee, and the transmission of the endorsed bill of lading, the consignor had so parted with the property and the right of possession as not to be entitled to intercept the delivery.

In the course of his argument in Gurney *vs.* Behrend, 3 Ellis and Blackburn, 622, (77 E. C. L.,) Bramwell said:—

"It is a common thing for the consignor to send the bills of lading and the drafts together, to his agent, with directions to give up the bills of lading when the drafts are accepted. * *

Now, in the present case, the course pursued by Th. Behrend & Co. was exactly equivalent to sending the bill of lading and draft to Collman and Stolterfoht, with instructions not to part with the one till the other was honored."

Crompton, J.: "The course of business which you describe was common enough a few years ago. The bill of lading was attached to the draft and sent to an agent, with directions not to part with it till the draft was accepted; and particularly in the trade between America and Liverpool, it was common enough to insist on retaining the bill of lading till the draft was not only accepted, but paid, or satisfactory security given that it would be ultimately paid; and questions of great nicety arose, when the right so to retain it was disputed. But I always understood this to be an exceptional course, adopted only in times of peril and suspicion; whilst your argument assumes that it is the ordinary course of trade."

Lord Campbell, C. J.: "The bill of lading was not in this case attached to the draft: on the contrary, the letter of 4th of January tells Collman and Stolterfoht that it was drawn at two months, to the order of R. Warschaur & Co., or third party; so that it might continue in circulation, and not be presented for acceptance for the whole of these two months. Do you say that the vendee was to have his power to deal with the goods suspended till an event over which he could have no control? That would be hard on him." *Id.*, 628, 630.

In Joyce *vs.* Swan, 17 J. Scott, N. S., 84, the consignors wrote—"We presume we may value on you at six months from the date of shipment," and shipped the goods under a bill of lading deliverable to them or their assigns. The price was not definitely agreed on in the correspondence, but upon presentation of the bill of lading and the draft, the consignee accepted. The vessel was lost, and to an action for the insurance-money defense was taken that the consignee had no insurable interest, but Erle, C. J., instructed the jury that "if the guano was appropriated to McCarter by Seagrave & Co. when put on board, with the intention of passing the property to him, they must find for the plaintiff; but that if they intended to keep the property in their own hands and under their own control until a final arrangement took place as to the terms of the bargain, they must find for the defendant;" which direction was held correct.

A case, identical with that now before the court, came before Vice-Chancellor Wood, now Lord Hatherley:—

A, having ordered goods from B, a firm at Calcutta, through C, their agent in England, received an invoice of the goods with a notice that B had drawn upon him for the price at six months.

On calling at C's office, A was met by C's messenger, who handed to him for his acceptance the bill of exchange drawn upon him in respect of the goods and the bill of lading, which was pinned to the bill of exchange. A accepted the bill of exchange and afterwards deposited the bill of lading with E, as a security for an advance, together with a policy of insurance upon the goods effected by himself in his own name, C having declined to part with the original policy, on the ground that it included other goods besides those purchased by A.

A having become bankrupt and unable to take up his acceptance, the goods were claimed by B and C, on the ground that the bill of lading had been improperly pledged, having come into A's hands irregularly and without the knowledge and contrary to an alleged custom amongst East India merchants not to part with the bill of lading of goods till the vendee has taken up his acceptance on account thereof. *Held*, that the alleged custom of trade was merely exceptional (as observed by Crompton, J., in Gurney *vs.* Behrend, 3 E. & B., 622, 630,) and was not established by the evidence as being the usual course of business, and that the title of E as *bona fide* assignee for value must prevail over any claim by the unpaid vendors. Coventry *vs.* Gladstone, L. R., 4 Eq. Ca., 493.

"The only question is, whether by the course of trade any such custom as that stated by the defendants—that it is the practice not to deliver the bill of lading to the intended vendee until he shall have taken up his acceptance on account thereof—has been established. So far, however, from that being the usual course, it is expressly referred to by Crompton, J., during the argument in Gurney *vs.* Behrend, as being an exceptional course, only adopted in times of suspicion and peril. I can quite understand such a term being inserted in the contract if any one should be foolish enough to consent to it, but I am not satisfied that any such custom as that alleged by the defendants has been established. By accepting the bill of exchange, which was made the price of the linseed, Waite has paid the consideration, and it is far too late for the defendants to contend that they have not authorized him to part with the bill of lading and that it was all a mistake. He has parted with the bill of lading in favor of the plaintiffs who are *bona fide* assignees for value, and I see no reason why it should not have been so parted with."—Sir W. Page Wood, V. C.

A very leading case upon the subject is that of Shepherd *vs.* Harrison, the decision of the Queen's Bench being reported in Law Reports, 4 Q. B., 196; that of the Exchequer Chamber, in the same volume, page 493; and that of the House of Lords, L. R., 5 H. L., 116.

It was ruled below, and the ruling was sustained above, that where the consignor had shown an intention to make the delivery of the bill of lading conditional on the acceptance of the draft, the consignee was bound to accept unconditionally, in order to become entitled to the possession of the bill of lading; but it was not contended for a moment that, if he had been willing to accept, he would not have become immediately entitled to the possession of the goods. In the House of Lords, the statement of the law, as given by Mr. Benjamin, in the first edition of his work, is cited with approval by Lord Chelmsford (page 127); and Lord Cairns makes this very clear and lucid statement of the law governing that and the present case:—

"It is important to remember the position of a mercantile house receiving a bill of lading and a bill of exchange drawn against the cargo for the purpose of obtaining the acceptance of the bill of exchange by the party upon whom it is drawn. I hold it to be perfectly clear that when a cargo comes in this way, protected by a bill of lading and a bill of exchange, it is the duty of those to whom the bill of lading and bill of exchange are transmitted in a letter either 'to approbate or to reprobate' entirely and completely the other. If they accept the cargo and the bill of lading and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount or use it as they think proper; and they are virtually paid for the goods. But if, on the other hand, the persons to whom the bill of lading is sent do not refuse *in toto* the consignment of the goods, but keep the bill of lading, but do not accept the bill of exchange, then the agents of the foreign shippers have neither the money nor the goods to deal with."—Pages 132–3.

In Gilbert *vs.* Guignon, 8 Ch. App., 20, which was a case of shipment of wheat from California, Lord Selborne (who had as Sir R. Palmer taken part in the argument of Shepherd *vs.* Harrison) affirmed the opinion of the Master of the Rolls to the effect that where, by the course of dealing, the consignor had acquired the right to "finance the cargo," by pledging the bills of lading with the bills of exchange, such pledgee would take the property as against one taking a duplicate bill of lading from the acceptor under circumstances which were sufficient to give notice of the prior pledge; but the Lord Chancellor observed:—

"It might be quite consistent with these dealings that Kemp, the purchaser, should have a right, when the bills of exchange were presented to him for acceptance, to say he would not accept the bills under this contract unless the bills of lading were at the same time delivered up to him. And if they had refused to deliver up the bills of lading, and he had offered acceptances on those terms as according to his contract, it may be that he would have had a right to bring an action for breach of contract as against Forbes & Co. That may be the case, and as to that much would depend upon the particular course of dealing between the parties, which might vary the mode in which the contract ought to be performed.

"But the real substance of the contract in such a case is, that the purchaser is to be under the obligation to accept only when the bills of lading come forward to and are seen by him in the proper course of the transaction, and if he, having the bills of exchange presented to him for acceptance, with the bills of lading annexed to them, does not think fit to claim the delivery of the bills of lading to him (supposing him to have the right to do so) if he is content that they should remain in the hands of the holder, it is exactly the same thing as if he had previously and originally authorized that course of proceedings, and had himself adopted that mode, as it is expressed, of 'financing the cargoes,' and that, according to my view of the evidence, is what actually happened in the present case." Gilbert *vs.* Guignon, *ut supra.*

The other leading authorities upon the same general subject are not inconsistent.

In Jenkyns *vs.* Brown, 14 A. & E., N. S., (68 E. C.L.,) 496, the consignor had made a pledge of the property which he had reserved to himself, and the consignee chose to accept without requiring the delivery of the bill of lading, and the question was between the assignees of the acceptor, who had not paid his acceptance at maturity, and the pledgees.

In Wait *vs.* Baker, 2 Ex., 1, the facts showed that the right of property was reserved and the bill of lading assigned to the plaintiffs, who took it in good faith. It was *held* that they could recover in trover from the vendee, who had obtained possession of part of the cargo; but Parke, B., expressly said—the vendee would have his remedy against the vendor, who had refused to deliver the goods on the tender of the price, which, it may be remarked, was to be paid in cash.

The case of Van Casteel *vs.* Bowker, 2 Ex., 691, turns on the right of stoppage *in transitu,* and involved also questions of a fraudulent preference in bankruptcy.

Turner *vs.* Trustees, 6 Ex., 543, was also a case of stoppage *in transitu,* and the dealing by the consignors with the bill of lading seems to have been expressly ratified by the consignees, who accepted after notice that the bank buying the bill required the delivery of the bill of lading. Page 550.

The case of Ellershaw *vs.* Maguire, 7 Ex., 569 (note), is to the point, that the shipper who had loaded a cargo which he had intended to send in fulfillment of an order, for which he had received payment, might change the destination, and upon receiving a bill of lading to his own order pass a good title to a *bona fide* assignee; but, in Key *vs.* Cotesworth, 7 Ex., 595, it was held that where the bills of lading were drawn deliverable to the defendants or their assigns, the property passed to them immediately upon the delivery on board ship, and the transmission of the bill of lading to them would not be diverted by a refusal to accept the bill drawn against the cargo.

And in the case of The Marine Bank, of Chicago, *vs.* Wright *et al.*, 48 New York Reports, (Commission of Appeals,) page 3, Mr. Justice Hunt, in delivering the opinion, said:—"The transfer of the bill to the plaintiff, (the bank which had discounted it,) under the circumstances stated, transferred, also, the title to the corn described in it. *The transfer was conditional and limited, to wit, to provide for and until the acceptance of the draft. The title would then pass to the acceptors as their security*, and the plaintiff's security would be transferred to the personal liability of the defendants as acceptors. The defendants having refused to accept the draft, the title of the plaintiff to the corn remained unimpaired."

It is submitted, therefore, that when the learned judge said, "A bank, receiving a bill of exchange for collection, cannot, without the consent of the owner, rightfully surrender the bill (of lading) to the drawee before payment," he assumed the very question in issue, and laid down a rule which is inconsistent with principle and precedent. If such a practice could have grown up anywhere it would have been in the shipment of merchandise from this country and India to England; but the authorities show that no such custom exists in England, nor does it obtain in France. Gurney *vs.* Behrend and Coventry *vs.* Gladstone are precisely in point to the contrary, and the cases, in which a special hypothecation of the bills of lading was made and sustained, are equally instructive. Such dealings are outside of the legitimate province of banks, and properly belong to bankers, whose business it is to make advances upon securities of all kinds. When a banker issues a letter of credit to a dealer, authorizing him to draw bills of exchange on his London or Liverpool correspondent, against bills of lading and sworn invoices of purchases made and consigned, the operation is effected upon the capital and credit of the banker. Merchandise of this sort, too, is usually neither of a perishable nor a chargeable character. Whether the consignee be the principal or agent, it is received by him for the purpose of resale, and practically he could make but the same disposition of it as the banker will do if it were delivered to him, and that is to deposit it in a warehouse on storage. The charges are just the same whether entered in the one name or the other, and in case of a sale or pledge of any portion of the property, a delivery order must be given any way to the pledgee or purchaser, and it is as easy to get it from the banker and let the payment be made to him, as it would be for the consignee to make the transaction himself. That such would be a natural and simple course of dealing is obvious, and the consent of the consignee would necessarily be involved in the terms of the arrangement under which the letter of credit was issued. So, too, in the analogous cases, like that described in Turner *vs.* The Trustees, *ut supra,* it is to the interest of the consignee to have the bills of exchange sold at the highest market rate, as he is obliged to pay the cost of the purchase at the port of shipment; but the domestic traffic of the country is of a very different character, and the decision of this case will settle the rule in every similar transaction in the future. Commonly, or, at least, frequently, such an operation as this is simply a convenient means by which the vendor of his own property collects the price from his vendee. The bank taking the draft for collection may, and frequently does, discount it, but it does so on the personal credit of the drawer, confirmed by the evidence that he has made a legitimate mercantile operation. It is perfectly true that if the bank chose to buy the merchandise from the drawer, and take the risk of making a new bargain with the consignee, it would be competent for it (subject to a disability to be presently mentioned) to do so; but it is clearly equally competent for it to restrict its dealing to its legitimate function, and to discount the draft instead of buying the bill. Supposing it to make the discount instead of the purchase—to act as a bank rather than as a merchant—its object must presumably be to have that done, which is necessary to preserve the vitality of the draft as a draft.

Accordingly, it sends such draft forward, "*for collection;*"—although, as was shown in Sweeny *vs.* Easter, *ut supra*, it does not so endorse it, when forwarded for its own account—it does not forward the cotton to "Boston, and a market." In order that such "*collection*" may be made, the draft must be accepted, and if acceptance be improperly refused, protested for non-acceptance, in order to hold the drawer and endorsers. Throughout, it is the draft which is the principal security,—the bill of lading is but the collateral; and, if so, with what show of reason can it be assumed, as it was by the learned judge below, that the principal is to be sacrificed to the incident? The normal use of the collateral is to have it make the draft a good banker's draft, by securing an acceptance which will give the holder recourse to every name upon it in case of non-payment—not to discharge every name and leave the owner (especially if such owner be a bank) with nothing but the accessory as the reliance. "The transfer was conditional and limited, to wit, to provide for and until the acceptance of the draft." Forwarded for "collection," all customary measures to ensure that are impliedly authorized, and if the drawee can only lawfully be required to accept, upon the surrender of the bill, such surrender is, of necessity, within the scope of the agent's authority. How foreign for the general business of a bank it would be for it to be required to adopt any other course will become apparent, if, instead of a shipment of cotton, it had been one of hogs or cattle on the hoof, peaches or other fruit, butter or eggs, and the term of credit had been more extended—to use Lord Eldon's illustration, the draft payable in three years, instead of three or thirty days. While it is true that a special hypothecation may be made of the bill of lading, which will be good as against the consignee, an express agreement is necessary, and it is submitted that, in the present case, there was no more than a mere novation, which gave the Memphis bank the right to require the acceptance as a concurrent act with the surrender of the bill of lading; but, be this as it may, there was nothing to give notice that the draft had been even discounted, and if so, and the Memphis bank was the simple messenger of the vendor to transmit, as an express company often is, the position of the Boston bank would be this: As against the vendor, the vendee would have the right either to rescind the contract, on the refusal to surrender the bill of lading, or to maintain trover or replevin on the tender of acceptance. If the goods were chargeable or perishable, their entire value might soon be lost, and the bank become liable to the consignee for the loss of the goods, and to the consignor for the loss of the draft.

If the draft, however, were discounted and the bill specially pledged, the drawee would still be discharged, and the position of the bank in respect to the pledge would be, to say the least, anomalous. It may be safely surmised that counsel, in drawing a "letter of hypothecation," for the pledge of bills of lading for foreign shipments, as security for the bills of exchange drawn against them, would take care to provide for such a contingency, as, in the absence of an express agreement, there would be no right as against the drawer to sell or dispose of the pledge, except upon the usual notice of time and place of sale. But should the consignment be of goods as perishable as those already instanced, they would become worthless before a sale could be lawfully made. Such risks and embarrassments as these are necessarily incident to mercantile transactions, but certainly it is not to be presumed that a bank has willingly incurred them, without the notice is clear and distinct; but, on the contrary, it should be assumed, if possible, that it has been pursuing its appropriate business of banking, and this the rather, because for a national bank to engage in business, as a dealer in merchandise or real estate, is *ultra vires* and unlawful.

The eighth section of the national currency act of June 3d, 1864, provides, that every association under said act shall have power "to exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act."

No power is given to deal in real or personal property, except as to real estate, by section twenty-eight; and no express power being given to take a mortgage to secure future advances, it was ruled, in Fowler *vs.* Scully, 72 Pa. State Reports, 456, that such a mortgage was wholly void.

Agnew, J., says:—"The agument might close with the terms of the power to loan money on *personal* security, for agreeably to this rule and maxim, no other security than personal can be taken for money lent. This is the law of the bank's capacity and of its control. It accords with the nature of banking as a business which is precisely described in the language of the law itself,—the *discounting and negotiating* of promissory notes, drafts, bills, and other evidences of debts, (meaning, of course, debts *ejusdem generis*, such as checks, certificates of deposits, &c.,) the buying and selling of bills of exchange, bullion, and lending money on personal security. The reasons are manifest: the business of a bank is commercial, not that of dealing in real estate, brokerage, &c. It, therefore, does not buy and sell real estate, ground-rents, mortgages, stocks, produce, &c.

"It deals in commercial paper, on the security afforded by the personal responsibility of drawers, endorsers, and payers, and this, because banks are created for the purposes of trade, which require ready access to loans of money, and discounts on business paper made in the course of trade."

If this view of the act of Congress be correct, then, according to a very familiar rule of construction, ("the intendment that standeth with law shall be taken," Co. Litt., 42, 183; Shore *vs.* Wilson, 9 Cl. & Fin., 397,) the necessary intendment would be that, if the Merchants' National Bank, of Memphis, had sent forward these documents for its own account and not as the agents of the consignor, it did so only by virtue of its having discounted the draft, and its only right to the bill of lading was the same as that of the vendor to insure acceptance; or, in other words, it was simply carrying out the contract made by the drawer of the draft with the drawee; and, therefore, in the language of Lord Cairns, it was bound "to approbate entirely and completely." Within the limits of its charter it could acquire no other title to the goods than that of the drawer of the draft, which it had discounted, under his contract of sale, because to stipulate for any further interest in the cotton would be to enter into a dealing in property not authorized by law, while the necessary effect of such an agreement would have been to destroy the draft as a commercial instrument by annexing a condition which would release the drawee from the duty of acceptance. And it was found by the verdict that the title of the vendor—his right of possession—was to pass to the vendee upon his acceptance of the draft. In this view of the law the plaintiff in error did its whole duty, and the judgment should be reversed.

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PLAINTIFFS IN

AND
BOSTON,

STATE OF